

ARMBRUST & BROWN, L.L.P.

ATTORNEYS AND COUNSELORS

100 CONGRESS AVENUE, SUITE 1300
AUSTIN, TEXAS 78701-2744
512-435-2300

FACSIMILE 512-435-2360

JOHN J. CARLTON
(512) 435-2308
jcarlton@abastin.com

May 24, 2010

LaDonna Castañuela
Office of the Chief Clerk – MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Re: Docket No. 2010-0654-MWD
Applicant: 130 Cactus Investment, LP
Permit No.: WQ0014548001

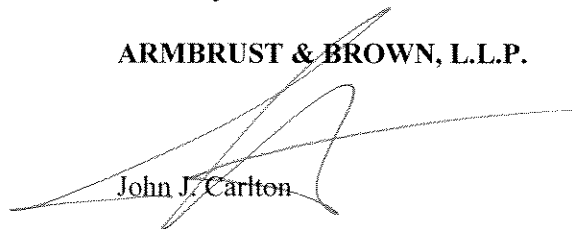
Dear Ms. Castañuela:

Enclosed for filing is Applicant, 130 Cactus Investments, L.P.'s Response to Hearing Requests in the above referenced matter.

If you have any questions, please do not hesitate to contact me.

Sincerely,

ARMBRUST & BROWN, L.L.P.



John J. Carlton

Enclosure

DOCKET NO. 2010-0654-MWD

APPLICATION BY 130 CACTUS	§	BEFORE THE TEXAS COMMISSION
INVESTMENTS, L.P. FOR RENEWAL	§	
OF WASTEWATER PERMIT	§	
NO. WQ0014548001	§	ON ENVIRONMENTAL QUALITY

APPLICANT, 130 CACTU INVESTMENTS, L.P.'s
RESPONSE TO HEARING REQUESTS

To the Honorable Commission:

130 Cactus Investments, L.P. ("Applicant") files this response to the requests for a contested case hearing (collectively, "Hearing Requests") filed by Fancy Fairchild, Hal Kuempel, Vernagene Mott, Marilyn Samuelson, and Kathleen Wolfer (collectively, "Requesters") and respectfully requests, based upon the following arguments, that the hearing requests be denied.

Background

On June 2, 2009, the Applicant filed an application ("Application") for renewal of TPDES wastewater permit number WQ0014548001 ("Permit") with the Texas Commission on Environmental Quality ("TCEQ"). The wastewater treatment plant ("Plant") will treat wastewater from residential and commercial development within the boundaries of the District. The Permit authorizes a 950,000 gallons per day discharge in the final phase. Effluent from the proposed treatment plant will be discharged to an unnamed tributary; thence to Wilbarger Creek; thence to Colorado River Above La Grange in Segment No. 1434 of the Colorado River Basin. The initial permit was issued on September 26, 2006 and authorized discharge of up to a 50,000 gallon per day of effluent treated to 5 mg/l CBODs, 5 mg/l TSS, 2 mg/l NH₃-N and 1 mg/l Total Phosphorus, and Dissolved Oxygen of 4 mg/l in Phases I and II and 5 mg/l in the Final Phase. The Application does not propose any change to the Permit.

After receiving instructions from the TCEQ, the Applicant published Notice of Receipt of Application and Intent to Obtain Water Quality Permit renewal on June 25, 2009 and July 2, 2009, as required by the TCEQ Rules. 30 TAC §39.151. After receiving the draft permit and direction from the TCEQ, the Applicant published notice of the Application on October 14, 2009 and October 15, 2009. Several individuals, including State Representative Mark Strama, requested a Public Meeting on the Application. The Public Meeting was held, after proper Notice was provided, on January 25, 2010.

The Executive Director issued a Response to Comments on March 26, 2010. As a result of the various comments, the Executive Director added provisions to the permit requiring an automated on-site generator and modified the licensing requirement to include operation of the facility by a Class B operator. The Applicant agrees with these changes.

The TCEQ received five requests for hearing before the Public Meeting was held. The TCEQ did not receive any requests after the Public Meeting. The five requests were: Fancy Fairchild on August 20, 2009; Hal Kuempel on August 19, 200; Vernagene Mott on August 6, 2009 and September 17, 2009; Marilyn Samuelson on August 25, 2009; and Kathleen Wolfer on August 25, 2009.

The Test

The TCEQ Rules provide a specific test for considering hearing requests. 30 Texas Administrative Code (“TAC”) Chapter 55, sets forth the procedures for considering and acting upon a hearing request. Section 55.211(c)(2) of the Rules sets forth the conditions for granting a hearing request by an affected person. The first step in the test is deciding whether the hearing request is from an affected person. If the hearing request is not from an affected person, it must be denied. If the hearing request is from an affected person, then the TCEQ must determine whether the request

“(A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director’s response to comment, and that are relevant and material to the commission’s decision on the application;

(B) is timely filed with the chief clerk;

(C) is pursuant to a right to hearing authorized by law; ; and

(D) complies with the requirements of §55.201 ...”

30 TAC §55.211(c)(2). If the hearing request fails any of these steps, then it must be denied.

Finally, under 30 TAC §55.201(i)(5), there is no right to a contested case hearing on an application to renew a wastewater permit if:

“(A) the applicant is not applying to:

(i) increase significantly the quantity of waste authorized to be discharged; or

(ii) change materially the pattern or place of discharge;

(B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;

(C) any required opportunity for public meeting has been given;

(D) consultation and response to all timely received and significant public comment has been given; and

(E) the applicant’s compliance history for the previous five years raises no issues regarding the applicant’s ability to comply with a material term of the permit; ...”

Since this is an application for a renewal of a wastewater permit, §55.201(i)(5) must be followed.

No Right to Hearing on Permit Renewal

In this matter, the Applicant is not applying to increase the quantity of waste authorized to be discharged or change the pattern or place of discharge nor does the Applicant have any negative compliance history. The Applicant is merely seeking to maintain the quality of waste authorized to be discharged. In addition, a Public Meeting has been held, the TCEQ has responded to all timely received and significant public comments. Consequently, under 30 TAC §55.201(i)(5), there is no right to a contested case hearing on this Application.

Affected Person Analysis

The TCEQ Rules define an affected person as “a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” 30 TAC §55.203(a). Therefore, someone who requests a hearing must show a personal justiciable interest in order to be an affected person.

In determining whether someone has a “personal justiciable interest” the TCEQ is required to consider all relevant factors, including, but not limited to:

- “(1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application..”

30 TAC §55.203(c). The facts supporting the determination of affected person status must be present in the hearing request, which is required to

“(2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public; ...

(4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. ...”

30 TAC §55.201(d).

The hearing requests filed by Fancy Fairchild, Hal Kuempel, Marilyn Samuelson and Kathleen Wolfer fail to provide any information allowing the TCEQ to determine whether these individuals have a personal justiciable interest in the Application. They do not identify the location of their property and do not explain how the requestor will be affected in a manner not common to members of the general public, nor do they list any relevant and material disputed issues of fact. These hearing requests do not meet the TCEQ standards for establishing that an individual has a personal justiciable interest and is an affected person, and they should be denied.

Further, Marilyn Samuelson's hearing request is signed in her capacity as Vice President of the Blackland Prairie Concerned Citizens Association. The TCEQ Rules allow a group to request a contested case hearing

“only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.”

30 TAC §55.205(a). Her request contains no information that would allow the TCEQ to conclude that the Blackland Prairie Concerned Citizens Association is entitled to request a hearing and should be denied.

Mott Hearing Request

The final requestor, Vernagene Mott, appears to own property that is adjacent to the property on which the Plant will be located and along Wilbarger Creek less than a mile downstream from the property. Her hearing requests raise several points that will be addressed below. Assuming that her hearing requests are from an affected person, then the TCEQ must

determine whether the request (1) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the TCEQ's decision on the application; (2) is timely filed with the chief clerk; (3) is pursuant to a right to hearing authorized by law; ; and (4) complies with the requirements of §55.201. If the hearing requests fail any of these steps, then they must be denied. The Applicant will address requirement (1) below. Items (1) and (4) have been addressed above, and Item (3) will not be addressed because of the timing of the Hearing Requests.

Relevant and Material Issues of Fact Raised in Public Comment

1. City of Pflugerville Issues

Mrs. Mott asserts that the Application should be denied because the City of Pflugerville has a regional wastewater treatment plant that will be built to serve this area in the future. She further claims that the City of Pflugerville will do a better job operating its regional plant than the Applicant will do operating the Plant. While it is true that the City of Pflugerville is seeking a permit for a very large wastewater plant that is located several miles away, that facility has yet to be permitted (in fact a Public Meeting has just now been scheduled for that permit), will require a substantial amount of time and money to complete once it is permitted, and has not been designated as a regional facility. In addition, the City of Pflugerville has received multiple notices of this Application and chosen not to protest, which would seem to indicate that the City is not opposed to the issuance of the Permit for the Plant.

Mrs. Mott also states that the Permit should be denied because the Plant site is now within the City of Pflugerville's Extraterritorial Jurisdiction. Whether this Plant is within a City's extraterritorial jurisdiction is not relevant or material to the issuance of the Permit.

2. Fiscal Prudence

Mrs. Mott also asserts that the Permit should not be issued because money should not be spent on this facility. Whether money is spent on this Plant is not a matter under the jurisdiction of the TCEQ and is not relevant or material to the issuance of the Permit.

3. Notice

Mrs. Mott also claimed not to have received notice of the Application. Because this Application is for renewal of the Permit, the Applicant was not required to mail notice to landowners. Since filing her hearing request, Mrs. Mott has received all mailed notices that have been issued by the TCEQ. Consequently, the issue of notice is irrelevant and immaterial to the issuance of the Permit.

4. Contractual Issues

Mrs. Mott raises several issues relating to a contractual agreement between herself and the Applicant and its predecessor in interest. The TCEQ has no jurisdiction over contract matters between private individuals and entities. Mrs. Mott's claims in this regard are irrelevant and immaterial to the issuance of the Permit.

5. Sewage Spills

Mrs. Mott expressed concerns about spills of raw sewage at other wastewater treatment facilities in the area. Such events, while important to the environment, are not relevant or material to the issuance of the Permit for the Plant.

In conclusion, Mrs. Mott's hearing requests do not raise any issues that were raised during public comment that were material or relevant to the issuance of the Permit. All of the issues that she raised were addressed by TCEQ staff in the Response to Comments, and TCEQ Staff concluded that the Permit should still be renewed. The Applicant asserts that Mrs. Mott's hearing requests should be denied in their entirety.

Alternative Continuance

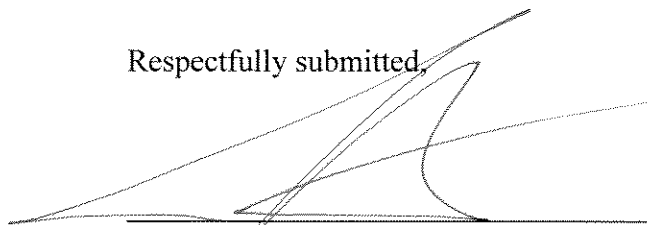
While the Applicant strongly opposes the Hearing Requests and supports the TCEQ's denial of those requests, if the Commissioners conclude that the Hearing Requests satisfy its requirements, the Applicant would propose that the Commissioners refer this matter to mediation for 120 days in lieu of referring it to a contested case hearing. This period would allow the Applicant and the Requesters to negotiate a long term solution to the water quality concerns of the neighboring landowners.

Conclusion

The Application for a renewal of the Permit should not be referred to the State Office of Administrative Hearings. The Hearing Request's are not sufficient under the TCEQ Rules because they were not filed by affected persons, are not relevant and material, and are not pursuant to a right to hearing authorized by law. For these reasons, the Applicant requests that the TCEQ deny the Hearing Requests and approve its application for renewal of its Permit.

In the alternative, the Applicant requests that the Commission continue this matter for 120 days to allow the Applicant and the Requesters to negotiate a solution to the dispute.

Respectfully submitted,



JOHN J. CARLTON

State Bar No. 03817600

ARMBRUST & BROWN, L.L.P.

100 Congress Avenue, Suite 1300

Austin, Texas 78701-2744

(512) 435-2300 – Telephone

(512) 436-2360 – Telecopy

ATTORNEY FOR THE APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via regular mail, facsimile or certified mail, return receipt requested as indicated to all parties of record in Docket No. 2010-0654-MWD on this the 24th day of May, 2010.

FOR THE APPLICANT:

Irma Speers
130 Cactus Investments, L.P.
2207 Lake Austin Boulevard
Austin, TX 78703
Fax: 512.481.9922

James A. Huffcut
Pape-Dawson Engineers
7800 Shoal Creek Boulevard
Austin, TX 78757-1098
Fax: 512.459.8867

FOR THE EXECUTIVE DIRECTOR

Kathy J. Humphreys, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, TX 78711-3087
Fax: 512.239.0606

Larry Diamond, Technical Staff
Texas Commission on Environmental Quality
Water Quality Division, MC-148
P.O. Box 13087
Austin, TX 78711-3087
Fax: 512.239.4430

FOR PUBLIC INTEREST COUNSEL

Blas J. Coy, Jr., Attorney
Texas Commission on Environmental Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, TX 78711-3087
Fax: 512.239.6377

FOR OFFICE OF PUBLIC ASSISTANCE

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, TX 78711-3087
Fax: 512.239.4007

FOR ALTERNATIVE DISPUTE RESOLUTION

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, TX 78711-3087
Fax: 512.239.4015

FOR THE CHIEF CLERK:

La Donna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Fax: 512.239.3311

REQUESTER(S)

Fancy Fairchild
8802 Unice Dr.
Elgin, TX 78621

Hal Kuempel
P.O. Box 266
Pflugerville, TX 78691-0266

Vernagene Mott
P.O. Box 951
Pflugerville, TX 78691-0951

Ms. Marilyn Samuelson
14914 Svenska Rd.
Coupland, TX 78615-4874

Kathleen Wolfer
8502 Jesse Bohls Dr.
Pflugerville, TX 78660-8918